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No. 72-910

In the

Supreme Court of the United States

THE STATE OF MONTANA, ex rel.
STANLEY C. BURGER,
Petitioner,

vs.

FORREST H. ANDERSON,
as Governor of the State of Montana,
Respondent,

and

WILLIAM F. CASHMORE, M.D.,
Relator-Respondent,

LEO GRAYBILL, JR., JOHN TOOLE, BRUCE BROWN, DOROTHY ECK, and JEAN BOWMAN,
Intervenors-Respondents,

STATE OF MONTANA and
FORREST H. ANDERSON, Governor, and
ROBERT L. WOODAHL, Attorney General,
Intervenors-Respondents,

DAVE M. MANNING, CLYDE HAWKS,
CARL M. SMITH, WALTER HOPE,
JESS J. BLANKENSHIP and HERBERT J. KLINDT,
Intervenors-Respondents.

Respondents' Brief in Opposition

TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The material facts are as follows:

The Montana Legislature by Chapter 65, Laws of 1969, provided for a referendum election on the issue of calling a constitutional convention pursuant to Article XIX, section 8, Montana Constitution (pp. 3-4, Pet.). At an election held November 3, 1970, the calling of a constitutional convention to revise, alter or amend the present constitution was approved. The legislature passed the necessary enabling act, Chapter 1, Extraordinary Laws of 1971, for such convention. After election of delegates on November 2, 1971, the convention convened, held hearings, debated and agreed upon a proposed 1972 constitution. The proposal was submitted to the electors at a special election held in conjunction with the primary election on June 6, 1972. The ballot contained four issues (pp. 6-7, Pet.).

Following the election, the returns were canvassed by the state canvassing board and the results were contained in a certificate of the abstract of the votes by the Secretary of State (p. 8, Pet.). The Governor proclaimed the proposed 1972 constitution approved and adopted.

On the same day as the Governor's proclamation, petitioner filed an original proceeding in the Montana Supreme Court seeking a declaratory judgment that the 1972 constitution was not ratified and adopted because it was not "approved by a majority of the electors voting at the election" as required by Article XIX, section 8 of the 1889 constitution. A similar action was filed by respondent William F. Cashmore. The Governor was named sole defendant in both actions.

By order dated June 22, 1972 (pp. 77-80, Pet.), the Montana Supreme Court accepted original jurisdiction, ordered the actions consolidated, and set the consolidated action for adversary hearing. Prior to hearing, an answer was filed by the Governor, a complaint in intervention

was filed, the Attorney General intervened as an additional respondent and filed a separate answer, and answers were filed to intervenors' complaint by the Attorney General and other intervenor respondents. Twenty written briefs were filed by the parties, intervenors and *amici curiae*, and oral argument was had.

On August 18, 1972, the court decided by 3 to 2 that the 1972 constitution was properly passed by a majority of the electors voting. The court held that the language relied on by petitioner and other opponents of the 1972 constitution was inherently ambiguous when read in connection with all of Article XIX, section 8, 1889 constitution (pp. 3-4, Pet.). Because of the ambiguity, the court interpreted the section in a manner which accorded with a natural right, majority vote, and indicated that before it would accept the opponents' arguments which would require an extraordinary majority, the constitutional requirement must be clearly required. The court stated that to accept the extraordinary majority principle would give a nonvoter on a particular issue the status of a negative voter which, absent a clear constitutional requirement, it refused to do. Recognizing that the several states are in conflict concerning the meaning of the phrase "majority of electors voting", the court rejected consideration of foreign jurisdiction case law and relied on two earlier Montana cases adopting the majority rule principle.

The Montana court stated:

> "Additionally, we must consider the policy and philosophy of government contained in our Constitution as enunciated in numerous cases including Tinkel v. Griffin, 26 Mont. 426, 68 P. 859. There the Court said:
>
> " 'The expression "majority of the electors thereof voting at an election," etc., clearly means a majority of those who vote, *and not a majority* of all of the electors of the county, or *of those who vote upon any other issue,* at

> the same or some other time.' (Emphasis added)
>
> "The philosophy of our Constitution was further explained in this language from *Tinkel:*
>
> " 'It is the theory of our government that those electors control public affairs who take a sufficient interest therein to give expression to their views. Those who refrain from such expression are deemed to yield acquiescence.' * * *" (pp. 40-41, Pet.)

On September 5, 1972, petitioner filed a petition for rehearing with the Montana Supreme Court as did relator Cashmore. After briefs were filed by all sides, the Montana Supreme Court denied the petitions 3 to 2 on September 25, 1972.

On December 21, 1972, a Petition for a Writ of Certiorari was docketed before this court.

REASONS AGAINST GRANTING THE WRIT

1. Petitioner Has Not Met the Jurisdictional Requisites of 28 U.S.C. §1257 (3), nor the Requirements of this Court, 28 U.S.C. Supreme Court Rules 19(1), That the Constitutional Validity of a State Statute Be Drawn in Question by the State Court and Requiring the Presence of a Federal Question of Substance.

The petition is made under 28 U.S.C. §1257 (3), providing for the granting of a writ of certiorari when the validity of a state statute is drawn in question in state court on the ground of its being repugnant to the Constitution of the United States. Rule 19 (1) of this court provides that a review on writ of certiorari will be granted only where there are special or important reasons such as where a state court decided a federal question of substance.

Before this court can invoke its jurisdiction by certiorari, a federal question must be raised in state court. *Ellis v. Dixon,* 349 U.S. 458, 99 L.Ed. 1231, 75 S.Ct. 850, rehearing denied 350 U.S. 855, 100 L.Ed. 759, 76 S.Ct. 37.

Petitioner alleges that federal questions were raised by him, intervenor Manning, *amicus* Longan, and *amicus* Scribner (p. 10, Pet.). An examination of the record clearly shows that at no time was a federal question presented to the state court by petitioner, nor was reference made to the Constitution, treaties or laws of the United States in any of the briefs cited. Even if there were federal questions raised by intervenors or *amici*, petitioner has no standing to raise those questions where he did not raise the same federal question in the state court. *Puget Sound Power etc. Co. v. King County, Wash.*, 264 U.S. 22, 25, 68 L.Ed. 541, 545, 44 S.Ct. 261 (1924).

Intervenor Manning, et al. (R. document 38; R. document 45, 11-13), *amicus* Scribner (R. document 47, 6-8), and petitioner (R. document 63, 9-11), all speak to the issue of whether voters were properly informed concerning the value of their vote. At no time in the documents cited above, however, was the issue raised that either the equal protection or due process principles of the Fourteenth Amendment to the Constitution were violated. Petitioner now attempts to raise that constitutional issue (pp. 16-21, Pet.) for the first time.

Assuming that a federal question was raised by the briefs cited, albeit indirectly, it is readily apparent why the Montana court did not discuss the question of misrepresentation to voters. Petitioner discussed four instances where he contended the voters were misinformed: First, the legislature used the language of the 1889 constitution concerning the method of voting on the 1972 constitution; Second, several delegates to the constitutional convention signed an unofficial advertisement explaining the 1972 constitution; Third, the language for constitutional revision in the 1972 constitution is more specific than that of the 1889 constitution; and Fourth, another issue found on the official ballot had an explanation that it would not be adopted unless a majority of those voting in the election voted for it (R. document 63, pp. 9-11).

No testimony was ever introduced that a single Montanan relied on the representations alleged by petitioner. No suggestion was ever made in the briefs filed before the initial hearing of this cause or in the briefs in support of rehearing that citizens of Montana were denied the equal protection of the laws or due process of law by the representations allegedly made.

Petitioner states that a federal question was raised by *amicus* Franklin Longan (R. document 57, p. 2). *Amicus* Longan raised no constitutional issues in his brief.

The only brief cited by petitioner which validly raised constitutional issues is that of intervenor Robert L. Woodahl, counsel for the Governor and executive branch of state government (R. document 55, pp. 19-20). In that brief, respondent argued against petitioner's theory that Article XIX, section 8 of the Montana Constitution (pp. 3-4, Pet.) required a majority of the total number of electors appearing at the polls before passage of the 1972 constitution. Respondent argued that that theory would give a ballot blank on the issue of adoption of the constitution the effect of a negative vote. This we contended would dilute the weight of the total number of yes votes cast and would violate the rights of citizens of Montana to the equal protection of the laws in that the principle of one vote for one man would be abrogated.

The Montana Supreme Court recognized that this issue had been raised by the respondent (p. 34, Appendix A, Pet.), but did not reach the question because it reached its decision through application of state law in a manner that did not dilute the vote.

The argument now raised by petitioner concerning the dilution of votes is one entirely different from that posed by respondent in the Montana court (pp. 20-21, Pet.). Petitioner argues that citizens may have opted not to vote on the issue thinking that in so doing they were casting a negative vote. They assert that for the Mon-

tana court to only count actual votes cast dilutes the value of a citizen's choice not to vote. We have pointed out that there was absolutely no evidence introduced that any citizen exercised that option. Further, that issue was never raised in the Montana Supreme Court.

The only issue which petitioner claims to have raised in state court is that of alleged misrepresentation to voters. In his discussion of reasons for granting the writ (pp. 11-25, Pet.), petitioner now raises a number of constitutional issues which were not presented to the state court. This court has held that where only one constitutional question has been raised in state court, petitioner cannot raise new issues in a petition for review. *Dewey v. Des Moines,* 173 U.S. 193, 196-200, 43 L.Ed. 665, 666-667, 19 S.Ct. 379 (1899).

CONCLUSION

An examination of the record shows that petitioner did not raise a federal question in state court. He now attempts to rely on language of other parties, both proponents and opponents of the adoption of the 1972 Montana constitution. A party may not rely on federal questions he did not raise in state court. No federal question was raised by the opponents of the adoption of the 1972 Montana constitution. The only federal question squarely raised which was cited by petitioner was raised by respondent Robert L. Woodahl. That question was not reached by the state court because the decision was correctly decided based on state law. Petitioner now attempts to raise a number of new federal questions which were not raised in state court. The writ should not issue.

Respectfully submitted,

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I, ROBERT L. WOODAHL, Attorney General of Montana, one of the attorneys for the respondents, Forrest H. Anderson, Leo Graybill, Jr., et al., Robert L. Kelleher, and State of Montana, et al., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of January, 1973, I served copies of the foregoing Respondents' Brief In Opposition To Petition For Writ Of Certiorari on the several parties thereto, pursuant to Rule 33, as follows:

To Petitioner, Stanley C. Burger, by mailing copies in a duly addressed envelope with first-class postage prepaid to one of his attorneys of record:

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To respondents William F. Cashmore, M.D., and Dave M. Manning, Clyde Hawks, Carl M.

Smith, Walter Hope, Jess J. Blankenship and Herbert J. Klindt, by mailing copies in duly addressed envelopes with first-class postage prepaid to their respective attorneys of record as follows:

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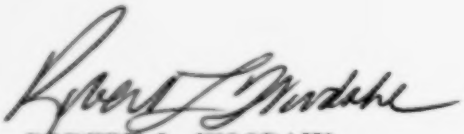

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